APPENDIX.

Sachs et al. v. Ginsburg.

91 Pittsburgh Legal Journal 217

ROWAND, P. J., April 29, 1943.—The plaintiffs filed their bill to enjoin the defendant from bringing criminal charges against the plaintiffs. It appears that the defendant, as prosecutor, had charged the defendants before divers magistrates with conspiracy and libel arising out of certain transactions that had taken place in the bank of which the plaintiffs were officers. The defendants having been arrested and bound over to the court and furnished bail, but, on petition of *habeas corpus,* they were discharged for the reason that no crime had been committed as alleged.

The parties: Charles H. Sachs is a member of the bar of this county and has been active in the practice of law for upwards of forty (40) years; he was attorney for the Washington Trust company. William C. McEldowney, a gentleman upwards of seventy-five years of age, is also a member of the bar of this court, but not engaged in active practice, but has been president of the Washington Trust company for a number of years. Max Perlman is and has been treasurer of the Washington Trust company for a number of years. Phillip Ginsburg, defendant, was a merchant. All parties are residents of the county of Allegheny.

A hearing was entered into, both parties presenting their testimony in full; the same has been considered carefully and, from this, we find the following findings of fact.

FINDINGS OF FACT

1. On May 12, 1941, the defendant, Phillip Ginsburg, was indebted to the Washington Trust company on a promissory note in the sum of $750.00, the due date of the note being June 3, 1941; this note was without security. On the same day, or May 12, 1941, the defendant made a further loan from the Washington Trust company in the sum of $5,100.00, this was a collateral note, payable on demand. The collateral pledged for payment of this note being book accounts of the defendant totaling $6,777.52. On said note appears "as per schedule dated May 12, 1941, attached, assigned to the Washington Trust company of Pittsburgh, Pa." The note further recites that the defendant "pledged and deposited herewith as collateral security for payment of this or any other liability or liabilities" the described collateral.

2. On the day of delivery of the note as referred to in findings of fact No. 1, the defendant executed what is referred to as "assignment of book accounts" (plaintiffs' exhibit No. 1). On examination of this exhibit we find the following covenants and warrants:

"5. That assignor will not do or suffer anything to be done that shall or may hinder or prevent the assignee from collecting payment of said accounts."

Upon the same day the defendant had delivered to the trust company separate statements of the "assignment of book accounts" each of which was stamped with assignment stamp.

3. There was not at any time any valid oral understanding between the parties that either destroyed, nullified or modified the terms of the demand collateral note,

the written assignment stamped on the book accounts or the written "assignment of book accounts."

4. On May 29, 1941, the defendant being still indebted to the trust company on his note of $750.00, which was without collateral, and indebted in the sum of $3,792.11 on the principal of the note of May 12, 1941, (payments on account of the principal having been made decreasing the debt due on the principal to that amount) on a demand collateral note similar in form to the note of May 12, 1941, and containing the specific pledge of the security for the payment of defendant's "other liability of liabilities," borrowed the further sum of $1,050.00, delivered his demand note in that amount, under date of May 29, 1941, to the trust company and assigned book accounts in the sum of $1,346.48; he also delivered separate statements of said book accounts which were duly stamped as assigned; and he further executed an additional written "assignment of book accounts" containing the same provisions or warranty that the assignor would not do or suffer anything to be done that would hinder or prevent the assignee (the trust company) from collecting payment of said accounts. There was not any valid oral understanding between the parties destroying, nullifying or modifying the terms of the demand collateral note or the written "assignment of book accounts."

5. On May 29, 1941, the defendant anticipated renewal of his non-collateral promissory note by discounting a new note in the sum of $500.00 due in sixty days, to-wit, July 28, 1941; this note was further renewad for thirty days in the sum of $500.00, due August 27, 1941; and although it became due the defendant did not renew it at maturity and it became overdue and unpaid and so remained until October 23, 1941.

6. On each of the collateral notes of May 2, 1941, and May 29, 1941, as heretofore referred to, defendant was permitted to receive collections from the debtors upon the understanding that such payments should be promptly remitted to the bank and they were so remitted to the bank in a number of instances, being paid by defendant's check, accompanied by a memorandum identifying the collection as to invoice and amount, with the result that on August 22, 1941, the original collateral note of $5,100.00 had been reduced so that the balance of the principal was then $265.11 and the balance of principal on the note of May 29, 1941, was $990.21.

7. On August 22, 1941, the defendant went to the office of the trust company and paid the balance of principal on the note of May 12, 1941, in the sum of $265.11 and then disclosed to Messrs. McEldowney and Perlman, the president and treasurer respectively, two of the plaintiffs herein, that he had collected the accounts, or most of them, and had used the money for other purposes, that is, to pay creditors other than the bank, at the same time demanding the return of the collateral deposited on the note of May 12, 1941, which was refused, for the reason that such collateral was pledged for his other liabilities, to-wit, the second collateral note and his promissory note, by the express terms of his note of May 12, 1941.

8. Learning of these facts the proper officers of the trust company directed that the balance remaining on defendant's checking account be applied on account of the principal of the note of May 29, 1941, which was accordingly done and proper notation made on the back of said collateral note.

9. Mr. McEldowney, president of the trust company, sent for and consulted with Mr. Sachs, solicitor for as well as an officer of the trust company, and discussed with him what action the bank should take about notifying the debtors of the assigned accounts. The facts were brought to the attention of the board of directors on Monday, August 25, 1941, at a regular meeting, at which time a resolution was passed that notice should be sent to the various debtors that their accounts had been assigned to the trust company by the defendant and the same were due and payable to the trust company.

10. In compliance with said resolution by the board of directors, Mr. Sachs drafted a letter and instructions were given to a Mr. Drutis, assistant secretary of the trust company, to calculate from the memorandum slips delivered to the trust company by the defendant, and the defendant's checks in payment of accounts, the amounts due from debtors of the assigned accounts, and this was done by taking the original amount of the account, giving credit for the collection made by the defendant according to his memorandum slips and his checks given in payment, and thus arriving at the balance due. Letters were sent out separately addressed to each of the debtors including the correct amount of the balance due as showed by defendant's report to the bank and his statements of account. The following being a form of the letter:

"WASHINGTON TRUST COMPANY
OF PITTSBURGH, PA.

Wm. C. McEldowney, President
Chas. H. Sachs, Vice President
Max Perlman, Treasurer & Trust Officer
E. L. Boyle, Secretary
H. W. D'Essipri, Assistant Treasurer
S. F. Drutis, Assistant Secretary

Washington Trust Company Building
Fifth Ave. and Washington Place

Pittsburgh, Pa., August 27, 1941

"Please take notice that your account amounting to ..... dollars due Phillip Ginsburg & Co., 202 American Bank Building, Pittsburgh, Pa., has been assigned to the Washington Trust Company of Pittsburgh, Pa., and all payments must be made direct to us.

"Please send us your check for the amount at once and oblige.

Very truly yours,

Max Perlman
Treasurer"

MP:AY

11. On December 10, 1941, the defendant, Phillip Ginsburg, through his then counsel, Elverton H. Wicks, filed suit in trespass against the trust company at No. 2687 January Term, 1942, in which the declaration as filed alleges that the series of letters of August 27, 1941, a copy of which is set forth in full in the preceding finding of fact, constituted libel and in which general and punitive damages were claimed by the plaintiff of the trust company in the sum of $25,000.00. The record shows that the writ was served December 12, 1941, and

on January 14, 1942, a rule for a bill of particulars was filed. On January 22, 1942, the bill of particulars was filed and no further proceeding on said case has since been taken, that is, the case has never been put to issue nor has any effort been made by the plaintiff to have it disposed of, although Paul Ginsburg, who is a member of this court and counsel for his father, on November 16, 1942, entered his appearance for the plaintiff; Mr. Wicks having died in the spring of 1942.

12. The defendant here, Phillip Ginsburg, and being represented by his son Paul Ginsburg, on May 26, 1942, before Alderman Newell of the city of Pittsburgh, and by information filed, charged the three plaintiffs with conspiracy to impoverish the prosecutor and to deprive and hinder him from following his trade and business as a merchant, said conspiracy being based upon joint action or actions of the three plaintiffs herein in causing the letters, dated August 27, 1941, to be mailed to the various debtors of Phillip Ginsburg. Warrants for the arrest of these three plaintiffs were issued and the plaintiffs were arrested and gave bail for hearing.

13. Again on the 28th day of May, 1942, Phillip Ginsburg, the defendant here, accompanied by his son Paul Ginsburg, who was then acting as attorney for his father, appeared before Alderman Newell and an information was filed charging the three plaintiffs herein with the crime of libel. Warrants were issued and again the three plaintiffs were arrested.

14. On May 29, 1942, hearing was had on both charges before Alderman Newell and because of the behavior of the prosecutor Phillip Ginsburg, and the defendant here, in refusing to answer proper questions on cross-examination, and being instructed and advised at

the time by his counsel, his son and lawyer, a full hearing was not had; the defendants did not offer any evidence and they were accordingly held for court on both charges of conspiracy and libel.

15. The three plaintiffs having surrendered themselves into the custody of John Haney, constable, they then presented their separate petitions for writ of *habeas corpus* to the court of quarter sessions of Allegheny county, which appear as Nos. 1, 2 and 3 June sessions, 1942, miscellaneous. On the relation of William C. McEldowney at No. 1 June sessions, 1942; on the relation of Max Perlman at No. 2 June sessions, 1942; and on the relation of Charles H. Sachs at No. 3 June sessions, 1942, wherein they alleged their detention was illegal and that the evidence was insufficient and the proceedings were illegal. The case came on to be heard before Honorable William H. McNaugher, a member of this court, then presiding in the court of quarter sessions, and, after testimony was taken and arguments had, the court entered in each case an order under date of July 16, 1942, sustaining the writs of *habeas corpus* and directing the discharge of relators, and in an opinion filed the court said:

"* * * There might be some room for argument as to the insufficiency of the evidence produced, but we think it plain that the proceeding was 'conducted not in accordance with law,' and that on this ground if not on the other the relator is entitled to relief.

"A review of the transcript reveals what we regard as gross irregularity in the examination of the prosecuting witness. On cross-examination by counsel for those who were the defendants in the proceeding, the attorney for the prosecutor sometimes suggested the

answer which the witness should give, sometimes himself gave the answer, frequently directed the witness not to answer certain questions which we find to have been relevant, and finally withdrew him altogether and thus made further cross-examination impossible. * * *"

16. On August 4, 1942, the defendant, Phillip Ginsburg, further appeared before Alderman Murray of the city of Pittsburgh and filed identical informations against the three plaintiffs herein, one charging conspiracy and the other charging libel. Warrants were duly issued and the three defendants were again arrested and gave bail, and hearing was set for August 12, 1942, at which time both cases were heard together. The three defendants were held for court on the charge of conspiracy and because the evidence did not support the charge of libel, the defendants were discharged.

17. The three plaintiffs here, or defendants there, again surrendered themselves into the custody of George McFarland, a constable, and again three separate petitions for writ of *habeas corpus* were filed at Nos. 192, 193 and 194 June sessions, 1942, miscellaneous, alleging illegal detention and that the evidence was insufficient. The cases came on for hearing and were heard together on August 21, 1942, at which time, testimony was taken and the cause was argued by counsel, and at which time the court made the following order:

"The court being of the opinion that the evidence is insufficient the writ is sustained and the relator is discharged."

The same order was made in each case.

18. On November 2, 1942, Phillip Ginsburg again, through his son and counsel Paul Ginsburg, at No. 444 June sessions, 1942, miscellaneous, in the case entitled

Commonwealth of Pennsylvania v. William C. McEldowney, Charles H. Sachs and Max Perlman, filed his petition reciting that Phillip Ginsburg, by information filed on May 26, 1942, before Alderman Newell, charged Messrs. McEldowney Sachs and Perlman with the crime of conspiracy and that they were held for court; that writs of *habeas corpus* were granted and pursuant thereto Messrs. McEldowney, Sachs and Perlman were discharged on the 16th day of July, 1942, the district attorney presented his motion for *nolle pros.* and accordingly an entry of *nolle pros.* was made as to the charge of conspiracy and that said allowance of *nolle pros.* was improper because it was made without the consent of the prosecutor, and without notice, and in his absence, and it was further made contrary to law. The petition prayed that the order of *nolle pros.* be stricken and that the said information be presented to the grand jury although the district attorney had refused so to do. In accordance with said petition the court fixed November 6, 1942, as the time for hearing.

19. On December 23, 1942, the court acting through John J. Kennedy, a member of this court and assigned to the quarter sessions court, made the following order:

"And now, December 23, 1942, after argument and review of the records and of the briefs submitted, it is ordered and decreed that the petition be and the same is hereby dismissed."

Judge Kennedy in his opinion, among other things said:

"Reviewing all this record, we are of the opinion that the district attorney at this time neither has in his possession sufficient evidence to request the court that the district attorney's bill of indictment be presented to

the grand jury, and further, if the district attorney, in his anxiety to fully perform his duties, would request permission to submit such a bill, such permission would be denied. Our conclusion, therefore, is that the prayer of the petition must be disallowed and an order will be made to that effect."

20. The defendant here again resorted to the civil court by filing a suit in trespass at No. 1669 October term, 1942, against Max Perlman, one of the plaintiffs here, charging conspiracy and libel because of the letters of August 27, 1941, as heretofore set forth naming Max Perlman as defendant and claiming damages in the sum of $25,000.00. The docket entries show service of the writ and filing of defendant's plea on December 1, 1942. No further proceedings have been had and said case has not been placed at issue nor brought to trial. A similar case has been brought against William C. McEldowney at No. 1670 October term, 1942, as well as a similar case against Charles H. Sachs at No. 1671 October term, 1942; the three cases are similar in nature, charging the same amount of damages and the docket entries are the same.

21. On December 23, 1942, the present bill in equity was filed, together with injunction affidavits and a restraining order was isssued. The court being the writer of this adjudication, fixed January 6, 1943, as the date of the final hearing on the merits. This was done with the understanding by the court at the time, that the case would be heard on the merits. On January 6, 1943, however, the defendant, Phillip Ginsburg, did not appear in person but was represented by his son and lawyer, who contended that he had never agreed to a final hearing on the merits on that date. Thereupon, a hearing was had and after a full day of testimony the defendant's counsel,

Paul Ginsburg, argued a verbal motion to dismiss the bill for lack of jurisdiction. Counsel for defendant cross-examined all witnesses, fully represented his father, the defendant, and at the close of plaintiffs' testimony refused to offer any testimony on behalf of defendant for the reason, as he gave, that "these complainants have not made out a case." This court made an order continuing the restraining order and enjoined and restrained the defendant, his son, or his or their agents, from making or filing any other or similar informations charging these three defendants with "Conspiracy in the nature of sending of the letters described in the bill, or in any of the matters or things embraced in the two previous informations charging conspiracy, described in the bill, or with criminal libel in connection with said letters."

22. At the close of testimony and the hearing as above stated, counsel for defendant was requested to file an answer, which he agreed to do, but, however, on January 25, 1943, defendant, through his counsel, filed preliminary objections to the bill which, by special order of court, was duly argued on February 5, 1943, and on February 9, 1943, the preliminary objections were dismissed and defendant directed to answer, which was accordingly done.

23. By special arrangement the date for trial was fixed for February 18, 1943, at which time counsel for plaintiffs then and there offered to use, as we understood according to stipulation entered into by both parties, all the testimony taken at the hearing on the preliminary injunction, subject to ruling and exceptions thereon, in order to save time for the court, to which defendant's counsel refused to agree. Following such refusal a full hearing was entered into, at which time the defendant

here admitted that he objected to the issuance of an injunction for the reason he intended to make further informations against these plaintiffs, based on the same facts.

DISCUSSION.

The foregoing findings of fact are fully supported by the evidence and exhibits produced. Counsel for the defendant contends throughout these proceedings that this court of equity has no jurisdiction. He has submitted requests for two findings of fact. First, the purpose of the bill of complaint is to enjoin Phillip Ginsburg, his agents, or attorneys from instituting criminal prosecutions on charges of libel and conspiracy. This is a fact and we have so found.

Second, the evidence introduced on behalf of defendants is incompetent, irrelevant and immaterial. This is without merit. If our position, which will be later stated, is correct that equity has jurisdiction, the testimony then is competent, relevant and material and is not disputed.

While counsel for defendant submits several requests for conclusions of law, they amount to his contention that the court of equity has no jurisdiction. We will try to deal with this as thoroughly as we can without encumbering the record.

As we have found by our findings of fact that the defendant here was a customer of the Washington Trust company, located on Fifth avenue at Washington street, in the city of Pittsburgh, which is an old established banking institution; plaintiffs involved in this case are officers of this institution.

Charles H. Sachs we can state from personal knowledge, and can be borne out by the bench and bar of this

court, has a reputation beyond reproach. He has been such a reputable member of this bar for upwards of forty years. We know that Mr. Sachs in the last year or two has not been well and should not be annoyed by vexatious litigation.

William C. McEldowney, as we have stated, is a reputable member of this bar, but is inactive; his whole time has been given to his position as president of the Washington Trust company; he is a man past seventy-five years of age and, as he stated on the witness stand, his health has not been good and unusual things are annoying.

Max Perlman is a younger man, but of the highest standing in the community, and he is treasurer of this trust company.

We have recited fully in our findings of facts the transactions that took place between this defendant and the representatives of the Washington Trust company. We have recited in our findings of facts that the officers of this trust company, upon learning that defendant had violated the confidence they had in him by collecting the book accounts without giving the bank a full and just accounting, and after he admitted he had converted the proceeds to his own use when he still was indebted to the trust company. These officers in sending out this letter did not act on their own initiative, they took counsel and the matter was presented at a regular meeting of the board of directors which board of directors is composed of reputable business men of this community, as shown by the evidence. The board of directors then passed a resolution directing what was to be done, that is, send out letters to these debtors to find out the standing of their accounts. The sending out of these letters, as we

recited in the findings of fact, is the basis for the prosecutions for conspiracy and libel.

If any person conspired in this case it was the board of directors and it would be ridiculous to charge them with conspiracy.

This court, through representatives sitting in quarter sessions court, has held that the sending of these letters was not libelous; it has held that there was no conspiracy that could be charged against them, then defendants and now plaintiffs; they were discharged on regular proceedings after informations were made and they were bound over for court. Charges were repeated and again they were discharged. Counsel for the defendant, the son, went to counsel for the plaintiffs in this case and advised that similar prosecutions would be continued. The defendant, himself, on the witness stand during the hearing of this case, said that their purpose and desire to defeat this bill was so they could continue prosecutions. This, as we look at it, is not a proceeding to interfere with the court of quarter sessions; it is not a proceeding to shield plaintiffs from a legal prosecution; it is a proceeding to protect them from vexations and unscrupulous litigation. Civil court has been resorted to, as we say, in bringing actions against the trust company as well as the plaintiffs in this case, for damages. No one has interfered with their being placed at issue and, if defendant here has been grievously injured and his reputation has been impugned, money damages can be allowed him.

Oft times the question may arise when prosecutors go into criminal court for certain prosecutions which, in many instances turn out to be persecutions, "what is the motive?" Oft times a money consideration will stop those prosecutions.

We come now to the question of law as to whether the collateral pledged for the collateral note referred to in our findings of fact is collateral for other liabilities and is a valid provision.

In the case of Commonwealth ex rel. Todd, Atty. General, v. Bank of Pittsburgh, Pa., 246 Pa. 519, the court said, at page 523:

"Undoubtedly Muehlbronner could stipulate that his own certificates which were thus deposited, should be held as security for any other indebtedness of his own. * * * True it is, that it was there, and the maker must be presumed to have read the note, and to have been familiar with the language of the instrument which he was signing."

We believe this is sufficient to base our conclusion that as these book accounts were twice assigned, once by stamped assignment on the statements of accounts, and again by regular form of assignment of book accounts given the bank. The bank had a right to attempt to collect the indebtedness and apply it to the liabilities in the bank. The defendant cannot take the position that these accounts did not pass to the trust company as security for the notes. He hindered and prevented the assignee from collecting payments of certain accounts by reason of the fact that he collected and converted this money to his own use to pay other indebtedness.

We have already stated that no successful prosecution could be made for conspiracy against these three plaintiffs. We are just as firmly of the belief that no successful prosecution could be made against these plaintiffs, jointly or separately, on the charge of criminal libel. These facts have been adjudicated by the court of quarter sessions of this county and the findings have been unappealed from. It must be borne in mind that

this is not an attempt to enjoin the district attorney, the public prosecutor of this county, from assuming conrol or to interfere in any way with the jurisdiction or control of the court of quarter sessions.

The bill, as stated, does seek to enjoin defendant, his agents, attorneys, or others from proceeding with vexatious litigation. A case in point is the case of Trees et al. v. Glenn, as reported in 319 Pa. 487. This is where a bill was filed in this court to restrain a defendant from proceeding with a suit in Butler county. It was argued that equity did not lie, but the supreme court held that a court can always protect its own jurisdiction. At page 491, the court said:

"In such a case it may restrain a party from prosecuting a subsequent suit in another jurisdiction, whether the objects of the two suits are the same or not, if the effect of the second suit is to withdraw from the court first acquiring jurisdiction a part of the subject-matter of the first suit. When an injunction is granted for this purpose, it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even assume to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction."

Further, on page 495, we quote:

"In his great work on Equity Jurisprudence, 14th ed., volume 2, section 1226, page 582, Mr. Justice Story under the head 'Injunction to Suppress Vexatious Litigation' has the following to say: 'Another class of cases of an analogous nature to which the process of injunction is also most beneficially applied is to suppress undue and vexatious litigation. We have already seen the man-

ner in which it is applied in cases of bills of peace. But courts of equity are not limited to their jurisdiction to cases of ths sort. On the contrary they possess the power to restrain and enjoin parties in all other cases of vexatious litigation. Thus for instance where a party is guilty of continual and repeated breaches of his covenants; although it may be said that such breaches may be recompensed by repeated actions of covenant, yet a court of equity will interpose and enjoin the party from further violations of such covenants. For it has been well remarked that the power has in many instances been recognized at law as resting on the very circumstance that without such interposition the party can do nothing but repeatedly resort to law, and when suits have proceeded to such an extent as to become vexatious, for that very reason the jurisdiction of a court of equity attaches."

We will agree had Mr. Ginsburg merely threatened to bring prosecution in the criminal court, we would be without jurisdiction, as a court of equity will not enjoin criminal proceedings.

Counsel for the defendant bases his position on two cases. We consider first the case of Cohen v. Schofield, 299 Pa. 496, in which case the supreme court affirmed the decree of the lower court in dismissing plaintiff's bill. The law as laid down in this case, of course, we do not quarrel with, as the bill in the recited case was to enjoin the police authorities of the city of Philadelphia from interfering with plaintiffs in conducting their respective manufacturing plants, praying for the return of property seized by the police and that further seizure be restrained.

The seizure in that case was made on the ground that the perfume comprising the shipment was not man-

ufactured in accordance with the federal permit, admittedly held by the manufacturer of the perfume, but was so differently prepared as to permit of being readily converted, by distillation or other simple process, into alcoholic liquor, fit for beverage purposes, the manufacture and sale of which were unlawful under the provisions of the act of March 27, 1923, P. L. 34, known as the Snyder act.

The second case is the case of Long et al. v. Metzger et al., as reported in 301 Pa. 449. It is true in this case the court held "an injunction will not be granted to stay criminal or quasi-criminal proceedings, whether the prosecution is for the violation of the common law or the infraction of statutes or municipal ordinances, nor to stay the enforcement of orders of a state commission."

In this case the medical practice act of June 3, 1911, P. L. 639, and its supplements and amendments, was questioned. Plaintiffs sought to restrain prosecution under this act. It was there held:

"Courts will not interfere by injunction where the injury inflicted or threatened is merely the vexation of arrest and punishment of the complainant, who is left free to litigate the question of unconstitutionality of the statute or ordinance or its construction or application, in making his defense at the trial or prosecution for its violation."

We are again of the opinion that the above recited case is not controlling in the instant case for the reason as stated before, prosecutions have been made and the legality adjudicated, and in the presence of the chancellor threats have been made for further prosecution.

We note from a case decided in the state of Kansas, it was held that repeated criminal prosecution may be

enjoined in equity. Foley v. Ham, 102 Kan. 66, L. R. A. 1918C. 204, at page 208:

"5. The decision that the order against the justice of the peace was properly granted renders of little practical consequence the question whether error was committed in rendering judgment against the individual defendants. As to them the action was one of injunction, and was maintainable for the same reasons that justified the prohibition against the officer, unless by reason of the rule which has sometimes been announced, that injunction against the prosecution of a criminal action will not lie except for the protection of property rights. 22 Cyc. 904; 14 R. C. L. 428. This rule seems to be founded on these considerations: The accused has usually a fairly adequate remedy by making his defense in the criminal action; a court of equity has no jurisdiction of the criminal matters, that subject being committed to courts of law; as a matter of public policy the court ought not to interfere with the representatives of the public seeking the enforcement of the law. *In the case of numerous, repeated, and vexatious prosecutions, it is evident that the remedy of meeting the charges in the courts where they are brought may not be entirely adequate; where the same court has jurisdiction of legal and equitable matters distinctions founded on that difference are of little importance; and with respect to an injunction which runs not against the public prosecutor, but against individuals who seek to direct the machinery of the criminal law in opposition to his judgment, the objection based on a reluctance to embarrass officers in discharging their duty to the government does not apply.* A court of equity would seem to be as responsive to a call for the protection of personal rights, in an appropriate case, as to one for the protection of rights relating

to property. In Brown v. Nichols, 93 Kan. 737, L. R. A. 1915D, 327, 145 Pac. 561, it is said: 'The remedy of injunction may be employed to protect personal and property rights, although it may operate incidentally to restrain a prosecution under an invalid ordinance.' Syllabus, 2." (Italics ours.)

There has been on our statute books a stern enactment prohibiting injuries by reiterating commitments for similar offenses and we quote from the act of 1785, Feb. 18, 2 Sm. L. 275, sec. 11. It is found in 12 Purdon's sec. 1886.

"And for preventing unjust vexation by reiterated commitments for the same offense, Be it enacted, * * * *That no person* who shall be delivered or *set at large upon a habeas corpus shall,* at any time thereafter, *be again committed* or imprisoned for the same offense, *by any person* or persons whatsoever, *other than by the legal order and process of such court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause,* and if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offense or supposed offense, any person delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved, any pretense of variation in the warrant or warrants of commitment notwithstanding, the sum of five hundred pounds, to be recovered by the prisoner or party grieved, in manner aforesaid." (Italics ours.)

This act has been construed by our supreme court in the case of Zebley v. Storey, 117 Pa. 478, at page 488:

"The offense with which the plaintiff was charged was a mere misdemeanor. It lacks every element of

public importance. Such prosecutions are seldom resorted to, except to collect a debt, and one can hardly imagine an instance in which a public prosecutor would ever interfere in such a case where the offender has been discharged upon *habeas corpus. And as the private prosecutor may not rearrest the party, such discharge, for all practical purposes, is an end of the case.* * * *" (Italics ours.)

Should the defendant, by himself with the connivance of his son, be permitted to make further informations based upon the same facts, we could see what damage may be done to these reputable citizens.

If an unscrupulous prosecutor would go to an alderman or justice of the peace late in the evening, make similar informations, the alderman, being unscrupulous, would cause the arrest of these same defendants and have them placed under arrest and, in their failure to give bond, be confined over night, the injury and damage done to them might be irreparable.

CONCLUSIONS OF LAW.

From the facts as recited and our discussion, we reach the following conclusions of law:

1. The action of the board of directors of the Washington Trust company directing that notice be sent to the customers of the defendant of the assignment of their accounts, and asking for payment thereof be made to the bank, was proper and a lawful action; and the acts and conduct of the plaintiffs as members of the board of directors and officers of the trust company, and plaintiff Sachs, as its solicitor, before, in and after the sending of the letters of August 27, 1941, were proper and lawful acts since the collateral notes of May 12 and May

29, 1941, and the written assignments in connection therewith, were lawful and binding upon the defendant, including the provision that the collateral was pledged for any and all other liabilities of the defendant held by the trust company, and the right of the trust company to demand and receive payment from defendant's customers.

2. We cannot find that there was an agreement expressed or implied, between the plaintiffs or with any other person, to injure or defame defendant or to hinder or damage him in the conduct of his business or trade as a merchant, either to accomplish any unlawful object or to accomplish a lawful object by unlawful means.

3. The letters of August 27, 1941, were not libelous in law, and were so adjudicated in the court of quarter sessions of Allegheny county at Nos. 192, 193 and 194 June sessions, 1942, miscellaneous.

4. The litigation instituted and carried on by the defendant has been and is and will continue to be, unless enjoined, vexatious and malicious. Plaintiffs, Messrs. Sachs and McEldowney, as reputable members of the bar of this county, have property rights, to-wit, their right to practice their profession and such right has protection in equity and they are entitled to be relieved of the annoyance and expense of prosecution at the instance of the defendant, under the circumstances of this case; otherwise they will be irreparably damaged.

5. Having assumed jurisdiction as we have, it is likewise our duty to grant protection to the plaintiff, Max Perlman.

6. A permanent injunction should issue enjoining and restraining the defendant, Phillip Ginsburg, and his

agents and attorneys, from filing and making, or causing to be made, any information or informations against the plaintiffs, or any of them, charging them with conspiracy in the matter of the sending of said letters of August 27, 1941, or in the matter of any correspondence following and relating to said letters of August 27, 1941, or in any of the matters or things embraced in the informations charging conspiracy and criminal libel in connection with said letters filed respectively in the office of Alderman Newell and Alderman Murray of the city of Pittsburgh.

DECREE NISI.

April 29, 1943, after hearing and full consideration, the preliminary injunction heretofore issued is made final, and it is ordered, adjudged and decreed: 1. That a final injunction issue and the said Phillip Ginsburg, the defendant named, his counsellors, attorneys and agents, are hereby enjoined and restrained from filing, making or causing to be made, any criminal information or informations against the plaintiffs, Charles H. Sachs, William C. McEldowney and Max Perlman, or any of them, charging them with conspiracy or criminal libel, in the matter of the letters as fully set forth in the findings of fact No. 10, or in any of the matters or things embraced in the criminal information heretofore made. 2. Costs of these proceedings shall be paid by the defendant, Phillip Ginsburg.

OPINION SUR EXCEPTIONS.

Before ROWAND, P. J., MCNAUGHER and THOMPSON, JJ.

ROWAND, P. J., for the court *en banc*, May 25, 1943. —This is now before the court *en banc* on exceptions of defendant to the chancellor's rulings, findings of facts and conclusions of law. There are forty exceptions filed by counsel for defendant, not for the purpose of expediting these proceedings, but for the purpose of prolonging and a continuous attempt to harass and annoy the chancellor.

At the hearing before the court *en banc* counsel for defendant was asked whether he intended to argue on the forty exceptions filed and his reply was in the negative; that he wished to confine himself only to the question of jurisdiction of the court of equity.

Counsel for defendant was asked by counsel for plaintiff if he would withdraw his exceptions and argue the question of jurisdiction and again his answer was in the negative; that he wished to stand on certain rulings that might be helpful to him and if he would withdraw then it might be harmful in the civil cases now pending.

The first ten exceptions are to the refusal of the chancellor to affirm the requests for findings of fact. The chancellor in his adjudication and in his discussion dwelt with the requests of counsel for defendant, while they were not taken up *seriatim* and discussed separately for the reason, as we have said in the adjudication, the several requests amounted to but two propositions, namely: First, that the evidence was incompetent, irrelevant and immaterial. This was discussed in our conclusions of law. Secondly, we further found that while there were several different requests they all amounted to the same thing, namely, that the court of equity had no jurisdic-

tion. The requests both for findings of fact and conclusions of law were fully discussed in our adjudication, which we believe, is unnecessary to again reiterate, particularly the discussion of the chancellor.

The eleventh to the thirty-third exceptions, inclusive, to the findings of fact are embraced in findings first to twenty-third, inclusive. In other words, each finding of the chancellor has been excepted to, merely stating that the defendant excepts to the chancellor's findings of fact. To show the absurdity and the attempt to prolong this litigation, counsel for defendant objected to the finding of fact number ten which is a copy of the letter sent out by the trust company, which is the basis of this litigation. Each finding of fact made by the chancellor was made upon the review of the testimony taken at both the preliminary and final hearings in this case and they are uncontradicted by any testimony produced by the defendant.

The court *en banc,* therefore, is of the opinion that the testimony fully supports the findings of fact and they should not be changed, and the exceptions are therefore dismissed.

The thirty-fourth to the thirty-ninth exceptions, inclusive, except to the conclusions of law one to six inclusive, as found by the chancellor. The conclusions of law rest on the findings of fact and the discussion of the chancellor and as we do not change the findings of fact, we are of the opinion that exceptions to the conclusions of law should be dismissed.

The 40th exception excepts to the entering of the decree *nisi.* As we have not changed the findings of fact and conclusions of law, we are of the opinion that the exception to the decree *nisi* is without merit and is therefore dismissed.

Counsel for plaintiffs has called our attention to typographical errors contained in the sixteenth finding of fact: we quote the finding of fact:

"16. On August 4, 1942, the defendant, Phillip Ginsburg, further appeared before Alderman Murray of the city of Pittsburgh and filed identical informations against the three plaintiffs herein, one charging conspiracy and the other charging libel. Warrants were duly issued and the three defendants were again arrested and gave bail, and hearing was set for August 12, 1942, at which time both cases were heard together. The three defendants were held for court on the charge of conspiracy and because the evidence did not support the charge of libel, the defendants were discharged."

This was in error as the last sentence of this finding should read as follows:

"The three defendants were held for court on the charge of libel and because the evidence did not support the charge of conspiracy, the defendants were discharged."

Further, by inadvertence or typographical error it appears in the findings of fact number seventeen, that "the case came on for hearing and was heard August 21, 1942," this should have read "September 30, 1942."

Further, in the finding of fact number eleven it is stated that the action against the trust company was in the sum of "twenty-five thousand dollars." This should read: "twenty thousand dollars."

We are of the opinion, however, that these typographical errors are of very little consequence in the final disposition of this case.

Counsel for plaintiff also complains of our refusal to affirm or treat the thirteenth finding of fact as requested. While this is a fact uncontradicted we would

therefore include it now as a finding of fact and add it, which reads as follows:

"13. Until October 23, 1941, defendant made no effort to pay the balance of the collateral note of May 29, 1941, or to renew or pay his overdue non collateral promissory note; on October 23, 1941, the defendant did pay the balance then due on his collateral note of May 29, 1941; he then did pay the accrued interest from August 1 to August 22, 1941, on the collateral note of May 12, 1941, and he did renew his non collateral promissory note in full by giving a new note for ninety days, due January 21, 1942; and when due, this note was further renewed for sixty days, to become due March 23, 1942, the discount being $5.08, which was paid by the defendant to the trust company; eight days later, to-wit, January 29, 1942, the defendant paid off in full the $500.00 non collateral note, and the trust company, although it was not required so to do, refunded to him the discount of $5.08."

Counsel for defendant for the first time at the oral argument, referred to the case of Meadville Park Theatre Corporation v. Mook, 337 Pa. 21. This we have examined and had examined before our adjudication, but we are of the opinion it is not in point because the alleged law infraction was never passed upon by the quarter sessions court. As we have already said in the instant case, the law infractions have been passed upon by representatives of this court, sitting in quarter sessions court. Also, in the Meadville Park Theatre case, the attempt was to enjoin the district attorney but, as we already said, this is not an attempt to enjoin the district attorney or any public officer in the discharge of his duty, nor to interfere with the court of quarter sessions.

The Meadville case recognizes that there are exceptions to the general rule and, as we have already pointed out in our opinion, this is vexatious and harassing litigation that is attempted to be stopped, and comes within one of the exceptions as pointed out in the Meadville case.

Counsel for defendant has recited further lower court decisions that are not in point and, upon examination, we find they are prior to the *habeas corpus* act of 1937, which is an extension of the bill of rights. It is the duty of the court when a petition is filed, to hear it and determine the act on the merits of the case. The records of quarter sessions court show that this was done in at least two instances.

FINAL DECREE.

May 25, 1943, after hearing and full consideration, the preliminary injunction heretofore issued is made final, and it is ordered, adjudged and decreed:

1. That a final injunction issue and the said Phillip Ginsburg, the defendant named, his counsellors, attorneys and agents, are hereby enjoined and restrained from filing, making or causing to be made, any criminal information or informations against the plaintiffs, Charles H. Sachs, William C. McEldowney and Max Perlman, or any of them, charging them with conspiracy or criminal libel, in the matter of the letters as fully set forth in the findings of fact No. 10, or in any of the matters or things embraced in the criminal information heretofore made.

2. Costs of these proceedings shall be paid by the defendant, Phillip Ginsburg.